

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL E. ULLUM)	
Claimant)	
VS.)	
)	
SEDAN LIMESTONE CO., INC.)	Docket No. 195,076
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the Award dated December 19, 1996, entered by Assistant Director Brad E. Avery. The Appeals Board heard oral argument on May 20, 1997, in Kansas City, Kansas.

APPEARANCES

Gary L. Jordan of Ottawa, Kansas, appeared for the claimant. Gregory D. Worth of Lenexa, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition to the stipulations noted by the Assistant Director, respondent and its insurance carrier also stipulated to timely notice of accident as indicated in their submission letter dated December 9, 1996.

ISSUES

The Assistant Director found claimant entitled to permanent partial disability benefits for a 66 percent work disability for the period from February 15, 1995, to August 3, 1995; for an 83.5 percent work disability for the period from August 4, 1995, to September 16, 1995; and for a 61 percent work disability commencing September 17, 1995. The respondent and its insurance carrier requested the Appeals Board to review the issue of nature and extent of disability. Claimant requested the Appeals Board to review the manner benefits are computed when there is a change in the percentage of permanent partial general disability. Those are the only issues before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Assistant Director should be modified.

- (1) What is the nature and extent of claimant's injury and disability?

The parties stipulated claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on June 9, 1994. As a result of that accident, claimant herniated a disc in his low back and underwent surgery in August 1994 to remove the disc and to fuse and decompress the lumbosacral spine.

Because his is an "unscheduled" injury, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e which provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Two physicians testified to the nature and extent of claimant's injury. The first, board-certified orthopedic surgeon Sergio Delgado, M.D., testified he examined claimant in April 1995 at claimant's attorney's request and determined claimant had a 24 percent whole body functional impairment as a result of the back injury. He felt claimant should avoid repetitive lifting from the floor of weights exceeding 15 to 20 pounds, avoid lifting above waist

level more than 35 pounds, limit repetitive lifting to 15 to 20 pounds, limit single lifts to 29 or 30 pounds, avoid frequent bending and twisting at the waist, avoid crawling, avoid riding in vehicles over rough terrain, avoid riding horses, and that claimant should alternate between sitting and standing through an eight-hour day and avoid sitting or standing in one position more than two or three hours at a time.

Dr. Delgado testified claimant's back injury prevented him from performing 9 of the 12, or 75 percent, of the tasks claimant performed during the 15-year period preceding his work-related accident as those tasks were identified and compiled by vocational rehabilitation expert Monty Longacre. Considering the task list prepared by vocational rehabilitation expert Karen Terrill, the doctor testified claimant, as a result of the back injury, could no longer perform 9 of the 14, or approximately 64 percent, of his former job tasks.

The second physician to testify, board-certified orthopedic surgeon David A. Tillema, M.D., examined claimant in January 1996 at the request of the Administrative Law Judge to render an independent medical evaluation. He found claimant sustained a 21 percent whole body functional impairment as a result of the back injury. Based upon a functional capacity evaluation arranged by the respondent and its insurance carrier, the doctor indicated claimant should avoid frequent bending over 15 to 20 minutes at a time and avoid lifting over 50 pounds. Assuming claimant's description of his former job tasks was accurate, Dr. Tillema indicated claimant could not perform 6 of 14, or approximately 43 percent, of the job tasks identified by Karen Terrill and 8 of 12 or approximately 67 percent, of the job tasks identified by Monty Longacre.

Because the Appeals Board is not persuaded that any of the above percentages are more accurate than the others, the Appeals Board averages the four task loss percentages and finds claimant has a 62 percent task loss for purposes of K.S.A. 44-510e.

After recovering from his back surgery, claimant found work with other employers. From February 15, 1995, through August 2, 1995, claimant worked as a ranch hand for the Rafter R Ranch earning \$276.92 per week, or 65 percent less than the stipulated average weekly wage of \$784.96. From August 3, 1995, through September 16, 1995, claimant was unemployed making the difference between pre- and post-injury wages 100 percent. Claimant then found employment with Fleming Farms earning \$355.08 per week, or 55 percent less than his average weekly wage on the date of accident.

As required by K.S.A. 44-510e, to compute claimant's permanent partial general disability the Appeals Board must average the percentage of claimant's task loss with the percentage of difference in pre- and post-injury wages. Therefore, for the period from February 15, 1995 through August 2, 1995, claimant's permanent partial general disability is the average of the 62 percent task loss and 65 percent wage difference, or 64 percent; for the period from August 3, 1995, through September 16, 1995, claimant's permanent partial general disability is the average of the 62 percent task loss and 100 percent wage difference, or 81 percent; commencing September 17, 1995, claimant's permanent partial

general disability is the average of the 62 percent task loss and the 55 percent wage difference, or 59 percent.

(2) How is an award of permanent partial general disability benefits under K.S.A. 44-510e computed when the permanent partial general disability percentage changes?

The Appeals Board recognizes K.S.A. 44-510e does not address how to calculate benefits payable for an injury when the disability rate changes for that injury. Under the pre-1993 calculation, the change in disability rate meant a change in the weekly permanent partial disability benefit rate for the remaining weeks payable. However, the benefit payment formula for injuries sustained after July 1, 1993, does not lend itself so easily to a change.

There are several possible methods of calculating the award when there is a change in the disability rate. After considering the various options and several hypothetical situations, the Appeals Board concludes the most equitable method is to calculate the award, or recalculate the award if benefits have already been paid based on a different disability rating, using the new or latest disability rate as though no permanent partial benefits have been paid or were payable under the earlier disability rate. The award so calculated gives the total number of weeks and amounts payable for the award. If permanent partial benefits were previously paid or payable (based on a different rate of disability) respondent is entitled to a credit for those weeks of payments in the new computation. If the disability rate goes down, as when the claimant returns to work after being off for a period of time, and if the new calculation on the new rating results in fewer weeks than respondent has already paid, respondent owes nothing more. However, if the percentage of disability increases, as when the claimant is laid off, a new work disability is calculated based on 415 weeks (less the number of temporary total disability weeks greater than 15) and the number of weeks of permanent partial benefits paid based on the lower rate is credited against the amount due. The last percentage of disability or amounts already paid, if higher, becomes the ceiling on the benefits awarded.

In the instant case, claimant had a 64 percent permanent partial general disability for the period between February 15, 1995, and August 2, 1995. That period comprises 24.14 weeks for which permanent partial benefits were payable.

Likewise, claimant had an 81 percent permanent partial general disability for the period between August 3, 1995, and September 16, 1995. That period comprises 6.43 weeks for which permanent partial benefits were payable.

When computing claimant's benefits in this award, one should start by subtracting the temporary total weeks in excess of 15, or 16.86, from 415 weeks which yields the absolute maximum number of permanent partial disability weeks available, or 398.14. Next, the 398.14 is multiplied by claimant's latest disability rate of 59 percent which yields a total of 234.90 weeks of permanent partial disability which is payable in this proceeding, subject, of

course, to later review and modification. When considering the applicable time period under the several or various disability percentages, one can see that claimant is entitled to 24.14 weeks of benefits for the 64 percent permanent partial general disability, 6.43 weeks of benefits for the 81 percent permanent partial general disability, and 204.33 weeks of benefits for the 59 percent permanent partial general disability for a total of 234.90 weeks of permanent partial disability benefits which is in addition to the temporary total disability benefits.

Claimant suggested an alternative method to that described above in which one would multiply the permanent partial disability percentage by the total number of weeks elapsed for that disability period to arrive at the number of weeks benefits should have been paid for that disability percentage. When the disability percentage changes, claimant suggests the new disability percentage is then multiplied by the remaining weeks of the award to determine the number of weeks of benefits claimant is entitled to receive at the new percentage. If more weeks of benefits were paid based upon the initial percentage than were actually due, claimant contends respondent could seek reimbursement from the Workers Compensation Fund.

Although claimant's proposal offers a creative alternative, the Appeals Board continues to favor the method it has followed in previous cases. The method followed by the Board makes each calculation of benefits, including the original and any change, on the basis of 415 weeks, giving credit for any benefits paid. The Board considers this to be more consistent with the calculation requirements contained in K.S.A. 44-510e.

A major drawback in claimant's suggested computation method is that it assumes respondent can obtain reimbursement of any overpayment of permanent disability benefits from the Workers Compensation Fund. However, the Workers Compensation Act, as presently written, does not provide for such reimbursement. K.S.A. 44-566a(e) lists the circumstances under which the Workers Compensation Fund is liable for payment or reimbursement of benefits. That statute only requires the Workers Compensation Fund to reimburse an employer or an insurer for overpayment of permanent partial disability benefits made during the pendency of appellate court review as required by K.S.A. 44-556(d)(1).

The Appeals Board has considered different methods of computation on numerous occasions and believes the formula regularly utilized by the Appeals Board is the best and only correct method among all those different methods and formulas considered.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated December 19, 1996, entered by Assistant Director Brad E. Avery should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Michael E. Ullum, and against the respondent, Sedan Limestone Co., Inc., and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury which occurred June 9, 1994, and based upon an average weekly wage of \$784.96 for 31.86 weeks of temporary total disability compensation at the rate of \$313 per week, or \$9,972.18. For the period from February 15, 1995, through August 2, 1995, claimant is entitled to 24.14 weeks of permanent partial general disability benefits at the rate of \$313 per week, or \$7,555.82, for a 64% work disability. For the period from August 3, 1995, through September 16, 1995, claimant is entitled to 6.43 weeks of permanent partial general disability benefits at the rate of \$313 per week, or \$2,012.59, for an 81% work disability. For the period commencing September 17, 1995, claimant is entitled to 204.33 weeks of permanent partial general disability benefits at the rate of \$313 per week, or \$63,955.29, for a 59% work disability, making a total award of \$83,495.88.

As of June 27, 1997, there is due and owing claimant 31.86 weeks of temporary total disability compensation at the rate of \$313 per week, or \$9,972.18; followed by 24.14 weeks of permanent partial general disability benefits at the rate of \$313 per week, or \$7,555.82; followed by 6.43 weeks of permanent partial general disability benefits at the rate of \$313 per week, or \$2,012.59; followed by 96.71 weeks of permanent partial disability compensation at the rate of \$313 per week, or \$30,270.23; for a total of \$49,810.82 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$33,685.06 is to be paid for 107.62 weeks at the rate of \$313 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts as its own the remaining orders set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

I concur with the computation method adopted by the majority for the reason it is the method previously utilized by the Appeals Board and for the sake of conformity should be retained unless the Appellate Courts rule otherwise. Claimant's proposed method is deficient in only one regard: the contention respondent should seek reimbursement for overpayment from the Workers Compensation Fund. As the majority opinion indicates, the Act currently does not allow for Fund reimbursement under those circumstances.

The claimant's proposed method of computation is appealing due to its simplicity and straight-forward approach to the accelerated payout method of K.S.A. 44-510e. However, it is important to note in many situations the injured worker would be entitled to considerably less when using claimant's proposed computation method as compared to the method presently utilized by the Appeals Board.

BOARD MEMBER

c: Gary L. Jordan, Ottawa, KS
Gregory D. Worth, Lenexa, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director